

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
ON-SITE PETROLEUM UNLIMITED, INC. :  
for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Period June 1, 1984 :  
through May 31, 1987. :

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In the Matter of the Petition :  
of :  
ASHLEY JARWOOD, AS OFFICER OF :  
ON-SITE PETROLEUM UNLIMITED, INC. :  
811606 :  
for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Period June 1, 1984 :  
through May 31, 1987. :

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DETERMINATION  
DTA NOS. 811604,  
811605 AND

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In the Matter of the Petition :  
of :  
TREVOR WISDOM, AS OFFICER OF :  
ON-SITE PETROLEUM UNLIMITED, INC. :  
for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Period June 1, 1984 :  
through May 31, 1987. :

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Petitioner On-Site Petroleum Unlimited, Inc., 56-15 58th Street, Maspeth, New York  
11378, filed a petition for revision of a determination or for refund of sales and use taxes under  
Articles 28 and 29 of the Tax Law for the period June 1, 1984 through May 31, 1987.

Petitioner Ashley Jarwood, as officer of On-Site Petroleum Unlimited, Inc., 200 East  
62nd Street, New York, New York 10021, filed a petition for revision of a determination or for

refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1984 through May 31, 1987.

Petitioner Trevor Wisdom, as officer of On-Site Petroleum Unlimited, Inc., 875 Cedar Swamp Road, Old Brookville, New York 11545, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1984 through May 31, 1987.

A consolidated hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 7, 1994 at 9:15 A.M. Briefs were filed by petitioners and the Division of Taxation. Petitioners' reply brief was received on October 24, 1994, which began the six-month statutory period for issuance of a determination. Petitioners appeared by Norman R. Berkowitz, Esq. The Division of Taxation appeared by William F. Collins, Esq. (John E. Matthews, Esq., of counsel).

### ISSUES

I. Whether a consent to extend the period of limitation for assessment of sales and use taxes against the corporate taxpayer, which was executed on behalf of the corporate taxpayer by a prior representative, was ineffective because the power of attorney appointing such representative was defective due to the failure of the corporate officer to have his signature properly witnessed or notarized.

II. Whether a consent to extend the period of limitation for assessment of sales and use taxes against the corporate taxpayer, if found effective, serves to extend the period of limitation for assessing tax against the corporate officers as well.

III. Whether the Division of Taxation properly resorted to a test period audit for determining additional sales and use taxes, in lieu of a complete audit of the corporate taxpayer's books and records, due to the seizure of the corporate taxpayer's records by Federal authorities during the course of the audit.

IV. Whether, if the Division of Taxation properly resorted to a test period audit, such methodology was reasonably calculated to reflect sales and use taxes due and, in particular,

whether the Division of Taxation properly disallowed certain tax-exempt sales claimed by the corporate taxpayer based upon the company's failure to substantiate their tax-exempt status with tax-exempt certificates.

V. Whether petitioner Ashley Jarwood and petitioner Trevor Wisdom, respectively, as officers, were persons required to collect tax under Tax Law § 1131(1) so that they were, as individuals, personally liable for sales and use taxes determined due from the corporate taxpayer for the period June 1, 1984 through May 31, 1987.

#### FINDINGS OF FACT

The auditor, Harold McKinney, described the corporate petitioner, On-Site Petroleum Unlimited, Inc. ("On-Site Petroleum"), as a petroleum company that "drop ships" fuel to construction sites (tr., p. 23). By "drop shipping" he meant that On-Site Petroleum brought "the actual fuel to the actual [construction] site itself" (tr., pp. 23-24). The auditor suggested that the fuel would be utilized at the construction site to run construction equipment such as bulldozers.

The Division of Taxation ("Division") issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated December 15, 1991, against On-Site Petroleum for a three-year period, June 1, 1984 through May 31, 1987, asserting total sales and use taxes due of \$82,878.11, plus penalty and interest, which was detailed as follows:

| <u>Period Ending</u>               | <u>Tax</u>  | <u>Penalty</u> | <u>Interest</u> |
|------------------------------------|-------------|----------------|-----------------|
| August 31, 1984 (185) <sup>1</sup> | \$ 6,659.01 | \$ 1,664.75    | \$ 9,205.48     |
| November 30, 1984 (285)            | 6,659.01    | 1,664.75       | 8,737.96        |
| February 28, 1985 (385)            | 6,659.01    | 1,664.75       | 8,289.14        |
| May 31, 1985 (485)                 | 6,659.01    | 1,664.75       | 7,843.86        |
| August 31, 1985 (186)              | 6,659.01    | 1,997.70       | 7,411.84        |
| November 30, 1985 (286)            | 6,659.01    | 1,997.70       | 6,997.19        |
| February 28, 1986 (386)            | 6,659.01    | 1,997.70       | 6,599.11        |
| May 31, 1986 (486)                 | 6,659.01    | 1,997.70       | 6,204.17        |
| August 31, 1986 (187)              | 9,629.01    | 2,888.70       | 8,417.23        |

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<sup>1</sup>The first digit of the three numbers in parentheses refers to the particular sales tax quarter and the last two digits references the particular sales tax year. For example, ("185") references the first sales tax quarter of the 1985 sales tax year, which runs from June 1, 1984 through August 31, 1984.

|                         |                 |                 |                 |
|-------------------------|-----------------|-----------------|-----------------|
| November 30, 1987 (287) | 6,659.01        | 1,997.70        | 5,453.22        |
| February 28, 1987 (387) | 6,659.01        | 1,997.70        | 5,100.15        |
| May 31, 1987 (487)      | <u>6,659.00</u> | <u>1,997.70</u> | <u>4,749.85</u> |
| Totals                  | \$82,878.11     | \$23,531.60     | \$85,009.20     |

On the face of this notice of determination, under the subheading "Explanation", was a checked box next to the following statement:

"The tax assessed above has been estimated in accordance with the provisions of Section 1138(a)(1) of the Tax Law . . . . The following taxes have been determined to be due in accordance with Section 1138 of the Tax Law, and are based on an audit of your records."

Corresponding notices of determination, also dated December 15, 1991, were issued against petitioners Ashley Jarwood and Trevor Wisdom, respectively, as officers of On-Site Petroleum.

#### The Timeliness of the Notices

Petitioners contend that the notices of determination were issued after the three-year period for assessment had expired.<sup>2</sup> If On-Site Petroleum's quarterly sales tax returns were filed timely, the return for the first quarter at issue, the period ending August 31, 1984 (185), would have been due on September 20, 1984, and the return for the last quarter at issue, the period ending May 31, 1987 (487), would have been due on June 20, 1987. It is observed that the record includes only the photocopies of the first page of the following six returns which were made part of the Division's Exhibit "K"<sup>3</sup>:

| <u>Period</u> | Gross Sales and<br>Services <u>Reported</u> | Taxable Sales and<br>Services <u>Reported</u> | Purchases Reported<br>Subject to Use <u>Tax</u> | Sales and Use<br>Tax Reported |
|---------------|---------------------------------------------|-----------------------------------------------|-------------------------------------------------|-------------------------------|
|---------------|---------------------------------------------|-----------------------------------------------|-------------------------------------------------|-------------------------------|

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<sup>2</sup>Pursuant to Tax Law § 1147(b), except in the case of a fraudulent sales tax return, "no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return." Tax Law § 1136(b) provides that quarterly sales tax returns must be filed "within twenty days after the end of the quarterly period covered thereby."

<sup>3</sup>Out of the 12 quarters at issue, as detailed in Finding of Fact "2", photocopies of the first page of only two quarterly returns were introduced into the record, only one of which was within the period at issue.

|                                  |            |              |        |             |
|----------------------------------|------------|--------------|--------|-------------|
| (1) 12/1/83-2/29/84 <sup>4</sup> | \$ -0-     | \$465,073.00 | \$ -0- | \$38,368.52 |
| (2) 7/1/85-7/31/85 <sup>5</sup>  | 54,892.00  | 54,892.00    | -0-    | 4,528.59    |
| (3) 1/1/86-1/31/86               | 129,828.00 | 129,828.00   | -0-    | 10,710.82   |
| (4) 7/1/86-7/31/86               | 97,082.00  | 97,082.00    | -0-    | 8,009.27    |

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4

This quarter is prior to the audit period at issue.

5

This return was a so-called "part-quarterly" return for the month of July 1985. The returns numbered "3" and "4" were also "part-quarterly" returns.

|                    |           |           |     |                       |
|--------------------|-----------|-----------|-----|-----------------------|
| (5) 6/1/86-8/31/86 | 63,091.00 | 63,091.00 | -0- | 26,025.00             |
| (6) 3/1/87-3/31/87 | --        | --        | --  | 4,779.00 <sup>6</sup> |

The record does not establish the specific dates of filing for each of the 12 sales tax returns at issue. However, included in the Division's Exhibit "J" are photocopies of six forms AU-2.10, "Consent Extending Period of Limitations for Assessment of Sales and Use Taxes Under Articles 28 and 29 of the Tax Law", which would seem to suggest that the returns were timely filed given the need for the Division to secure such consents. (Furthermore, the Division has not suggested that the returns were not timely filed.) The following summarizes the consents which were executed to extend the three-year limitations period:

| Period Under <u>Audit</u> | Date to Which Period of Limitation for Assessment Extended | Date Noted by Taxpayer <sup>7</sup> on Consent |
|---------------------------|------------------------------------------------------------|------------------------------------------------|
| (1) 6/1/84-8/31/84        | December 20, 1987                                          | August 11, 1987                                |
| (2) 6/1/84-2/28/85        | June 20, 1988                                              | November 13, 1987                              |
| (3) 6/1/84-8/31/85        | December 20, 1988                                          | May 5, 1988                                    |
| (4) 6/1/84-8/31/86        | December 20, 1989                                          | December 13, 1988                              |

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6

This return for the month of March 1987 was a so-called "March Estimated Monthly Sales and Use Tax Return" on which petitioner reported due \$4,779.00, which, according to the return, represented 1/3 of \$14,337.00, the tax shown on the return for the comparable quarter of the prior year.

<sup>7</sup>The consents were executed on behalf of On-Site Petroleum only.

(5) 6/1/84-8/31/87<sup>8</sup>  
(6) 6/1/84-8/31/88

December 20, 1990  
December 20, 1991<sup>9</sup>

November 9, 1989  
December 3, 1990

The consents numbered "1", "2" and "3" in Finding of Fact "4" were executed on behalf of On-Site Petroleum by petitioner Ashley Jarwood, in her capacity as treasurer of the corporation with reference to the consents numbered "1" and "2", and in her capacity as president with reference to the consent numbered "3". The consents numbered "4", "5" and "6" were executed on behalf of On-Site Petroleum by Benet Doloboff, who wrote "power of attorney" on the line for "title" on the consents.

The power of attorney referenced by Mr. Doloboff, who was and apparently continues to be On-Site Petroleum's accountant (and who was the only witness who appeared on behalf of petitioners at the hearing held in this matter), was dated August 24, 1987 by Ashley Jarwood, who, as treasurer of On-Site Petroleum, appointed Mr. Doloboff to serve as the corporation's representative before the Department of Taxation and Finance with regard to sales tax for the period June 1, 1984 through May 31, 1987. However, Ms. Jarwood's signature was neither acknowledged by a notary public nor witnessed by two witnesses. Petitioners argue that, as a result of this failure, Mr. Doloboff had no authority to act on behalf of the corporation. However, it is observed that, subsequent to April 24, 1987, Mr. Doloboff acted on behalf of On-Site Petroleum in many ways, including the following:

- (1) He scheduled audit appointments at his own office and at the corporation's place of business and met with the auditor, spoke with the auditor on the telephone, accepted

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<sup>8</sup>It is observed that the period designated in this consent as well as the following consent also covers a period subsequent to the period at issue.

<sup>9</sup>As noted in Finding of Fact "2", the three notices of determination at issue herein were each dated December 15, 1991, five days prior to December 20, 1991, the date to which the period of limitation for assessment was extended (by the sequential execution of the six consents detailed above).

requests for documents, forwarded such requests to On-Site Petroleum, obtained documents from the company and provided these to the auditor as noted in Findings of Fact "7", "8" and "9";

- (2) He prepared worksheets for use by the auditor;
- (3) He reviewed the auditor's workpapers and accepted a 30-day letter on behalf of the corporation; and
- (4) He was the sole person with any personal knowledge of On-Site Petroleum's operations to appear at the hearing in this matter on behalf of petitioners.

#### Seizure of Records by Government Authorities

In the course of the audit, the books and records of On-Site Petroleum were seized by the Internal Revenue Service. Petitioners introduced little evidence at the hearing and presented only the skimpy testimony of Mr. Doloboff, the corporation's accountant. For example, no background information or foundation was provided for the photocopy of the search warrant introduced into the record as petitioner's Exhibit "1". The search warrant is paged 520-522 suggesting that a lengthy record relates to it, and the "written affidavit" of Special Agent Ann Petterson, upon which it was based, was not introduced by petitioners. The search warrant appears to have been issued by a judge or U.S. Magistrate on March 26, 1988 at 5:40 P.M and was directed to "any Agent of the Internal Revenue Service and Federal Bureau of Investigation and pursuant to 18 U.S.C. § 3105 assisted by agents of the New York State Department of Taxation & Finance and Investigators from the Nassau & Suffolk County District Attorneys Offices". It authorized the search of the premises of On-Site Petroleum and its sister corporations, Wizard Petroleum Corp., Janus Corp., Terminelle Corp. and Fill-Up Corp., located at 364 Maspeth Avenue, Brooklyn, New York. The search warrant indicated that the items to be seized were "evidence, fruits, instrumentalities and the means of commission of violations of Title 26 [Internal Revenue Code], United States Code, Sections



7201 [Attempt to evade or defeat tax], 7202 [Willful failure to collect or pay over tax ], 7206 [Fraud and false statements], and 7232 [Failure to register, or false statement by manufacturer or producer of gasoline, lubricating oil, diesel fuel, or aviation fuel], and Title 18 [Crimes and Criminal Procedure], United States Code, Section 371 [conspiracy to commit offense or to defraud United States] and 1343 [Fraud by wire, radio, or television]."

As their Exhibits "2" and "3", petitioners introduced into the record photocopies of documents which apparently listed items taken by the government authorities. These photocopies are, in large part, unreadable, and petitioners presented no witness who explained or could provide a foundation for these documents. Furthermore, Exhibit "3" appears to pertain only to items regarding On-Site Petroleum's sister corporation, Terminelle Corp. The introduction of such exhibit, which upon review appears irrelevant to the matter at hand, reflects the strategy of petitioners at the hearing in this matter to merely poke holes in the Division's case and to attempt to create confusion in the factual record without providing any substantial evidence concerning the operation of petitioner. (Finding of Fact "1", which describes the nature of the corporate petitioner's business, was based upon testimony of the Division's auditor.)

The Auditor's Attempt to Conduct a Complete  
Review of Books & Records

By a letter mailed June 5, 1987, the auditor scheduled "a field examination" of On-Site Petroleum's sales tax returns. The auditor made the following request in his letter:

"All books and records pertaining to your sales tax liability for the period under audit [June 1, 1984 through May 31, 1987] should be available. This would include journals, ledgers, sales invoices, purchase invoices, cash register tapes, exemption certificates, etc. and all Sales Tax records. Additional information may be required during the course of the audit."

The auditor's log noted that at the field examination on July 14, 1987:

"T/P accountant [Mr. Doloboff] did not have all sales and purchase [invoices] for audit period. Auditor request all non-taxable sales for Q/E 11/30/84. Auditor request all back up documentation."

At the next appointment, which took place at Mr. Doloboff's office on September 2, 1987, the

auditor made the following entry, in relevant part, in his log:

"Auditor got analysis FYE 1986 for the following A/C's stationery, postage, equipment rental, computer expense, office expense. There were so many invoice[s] missing audit[or] left list of missing invoices to be gotten by t/p. Auditor did not received [sic] and [sic] analysis of auto expense (repair & maintenance). Auditor wants analysis for FYE 1986. Auditor did reconciliation of sales and purchase[s]. There are difference[s]. T/P accountant must explain. Auditor left reconciliation. Auditor wants to see sales journal 9/84 - 11/84. In misc. income auditor found a sale of IBM computer sold July 31, 1986 by t/p. Auditor wants to see invoice. Also breakdown of all N/T [nontaxable] sales."

The log shows that on December 15, 1987, which is prior to the seizure of On-Site Petroleum's records, the auditor apparently decided to conduct a test period audit of the corporation's nontaxable sales. The auditor testified that Mr. Doloboff verbally consented to a test-period audit (tr., p. 119). Mr. Doloboff could not recall giving such consent (tr., p. 170). It is observed that the auditor's log did not include an entry noting the taxpayers' agreement to a test-period audit. An entry for February 4, 1988 shows that the auditor went to Mr. Doloboff's office to perform an "analysis of repairs & maintenance given by accountant". He also on this date worked on a "non-taxable sales test 9/1/84 - 11/30/84".

The log shows that it was not until April 28, 1988, about a month after the date on the search warrant, that the auditor learned that On-Site Petroleum's records had been seized. The entry for such date provides as follows:

"T/P accountant call to tell auditor that the marshalls went to t/p and took some papers. Accountant doesn't know wheather [sic] these papers are the papers that the auditor needed. But he'll go to T/P next week."

An entry in the log for May 10, 1988 indicates "that all records were seized by federal gov't."

The log then shows that the auditor took many steps to attempt to obtain access to the records seized by the Federal authorities including several telephone calls to Federal Agent Anne Petterson. The log shows that, from the autumn of 1989 to the summer of 1991, the auditor made continued attempts to obtain permission to review records in the possession of the Federal authorities.

Finally an entry in the log dated July 23, 1991 noted as follows:

"Noah Daniels (Branch Chief) spoke to Joe Machhio in Albany. He said the State does have the records. Howere [sic] he'd like us to do the current years which

the state does not have and see what results we can get."

However, on direct examination, the auditor tried to contravene this entry for July 23, 1991:

Attorney Matthews: "Mr. McKinney, could you locate in your auditor log an entry dated 7/23/91?"

Auditor McKinney: "(No response)"

\* \* \*

Auditor McKinney: "Yes."

[Attorney Matthews then requested that the auditor read the first two sentences of the entry aloud.]

Attorney Matthews: "My question to you is, at the time is that sentence correct?"

Auditor McKinney: "That is not a correct sentence."

Attorney Matthews: "What is wrong about the sentence?"

Auditor McKinney: "It should be 'does not have' the records."

Attorney Matthews: "That's all I have."

Administrative Law Judge Barrie: "Is that your handwriting?"

Auditor McKinney: "Yes, it is. I just made--I just didn't put 'not' there when I should have." (Tr., pp. 55-57.)

Petitioners' attorney vigorously cross-examined the auditor concerning his "incorrect" entry for July 23, 1991 as follows:

Attorney Berkowitz: "What was the date of that entry?"

Auditor McKinney: "7/23/91."

Attorney Berkowitz: "That was about three years ago, roughly?"

Auditor McKinney: "Yes."

Attorney Berkowitz: "And until this time, you never corrected this log?"

Auditor McKinney: "I didn't, obviously. No."

Attorney Berkowitz: "Why not?"

Auditor McKinney: "I just didn't."

Attorney Berkowitz: "Did you review the log between July 23rd, '91 and today?"

Auditor McKinney: "Yes, I did. I looked at it. Yes, I did."

Attorney Berkowitz: "And did you look at it many times?"

Auditor McKinney: "Not many times but I looked at it . . . ."

Attorney Berkowitz: "Did you look at it prior to the Conciliation Conference held in this matter?"

Auditor McKinney: "Probably did."

Attorney Berkowitz: "And you didn't notice this error?"

Auditor McKinney: "Obviously not."

Attorney Berkowitz: "And did you look at it in preparation for today's testimony?"

Auditor McKinney: "Yes."

Attorney Berkowitz: "And did you notice the error then?"

Auditor McKinney: "Yes, I did. Yes, I did."

Attorney Berkowitz: "How did you point this out to anyone?"

Auditor McKinney: "How did I point it out to anybody? I just made a note that that was wrong."

Attorney Berkowitz: "Where did you make the note?"

Auditor McKinney: "To myself. I made the note and I spoke to the State attorney."

Attorney Berkowitz: "When was that?"

Auditor McKinney: "Ah, that was yesterday."

Attorney Berkowitz: "How long have you known you were going to testify on this matter?"

Auditor McKinney: "I'd say a couple months ago."

Attorney Berkowitz: "And in that time, a couple months and yesterday, did you review this worksheet?"

Auditor McKinney: "I read it quickly."

Attorney Berkowitz: "Did you review the worksheet?"

Auditor McKinney: "Yes, I did."

Attorney Berkowitz: "And you didn't notice the error?"

Auditor McKinney: "I didn't notice the error until I read it in detail and then I made note of that."

Attorney Berkowitz: "When did that occur?"

Auditor McKinney: "When I really -- actually looked at it as I was going up on the train."

Attorney Berkowitz: "So until yesterday, even though you reviewed several times, you never noticed this?"

Auditor McKinney: "You are correct. It's obvious I missed it."

Attorney Berkowitz: "I'm asking a simple question. Yes or no, you noticed or didn't."

Auditor McKinney: "I did not notice."

Attorney Berkowitz: "Although it was reviewed several times."

Auditor McKinney: "Yes. I looked it over, yes."

Attorney Berkowitz: "And when you found that you made the error, what did you do?"

Auditor McKinney: "I then spoke to the attorney."

Attorney Berkowitz: "When was that?"

Auditor McKinney: "When I met him."

Attorney Berkowitz: "When was that?"

Auditor McKinney: "I met with him yesterday." (Tr., pp. 57-60.)

Attorney Berkowitz: "The second sentence, however, 'He'd like us to do the current years, which the State does not have, and see what results we can get.' Does that imply the State does have records from previous years?"

Auditor McKinney: "The State didn't have his records."

Attorney Berkowitz: "What does the sentence say?"

Auditor McKinney: "(Pause for reading) All that is stating is that we wanted -- that my branch chief wanted to update the audit."

Attorney Berkowitz: "Does the word 'update' appear in the sentence?"

Auditor McKinney: "No. This is like they do the current years."

Attorney Berkowitz: "Which the State does not have?"

Auditor McKinney: "Which the State does not have."

Attorney Berkowitz: "Implying the State has prior years."

Auditor McKinney: "No. They did not have prior years."

Attorney Berkowitz: "No, no."

Auditor McKinney: "I'm just --"

Attorney Berkowitz: "Okay. You have no notes to that effect, any written document. The only written document whether the State has or does not have is in evidence and it says they do have it. Is that correct?"

Auditor McKinney: "Yeah, but it's in error."

Attorney Berkowitz: "Let me phrase the question so you can answer. Is it fair to say --"

Auditor McKinney: "Yes."

Attorney Berkowitz: "--that the only document with respect to the State having or not having -- the only written document with respect to whether the State has or does not have is this document. Is that correct?"

Auditor McKinney: "We got letters from the taxpayer."

Attorney Berkowitz: "No, no. I asked a simple question. Is it correct that this is the only written document the State has with respect to whether the State has the documents?"

Auditor McKinney: "Yes."

Attorney Berkowitz: "Is that correct?"

Auditor McKinney: "Yes. That is correct?"

Attorney Berkowitz: "When you got up to Albany yesterday and spoke to Mr. Matthews, did you call Mr. Daniels to verify your recollection?"

Auditor McKinney: "No."

Attorney Berkowitz: "Did you call Mr. Machhio?"

Auditor McKinney: "No."

Attorney Berkowitz: "Did you call anyone who was a party to this conversation?"

Auditor McKinney: "No."

Attorney Berkowitz: "Why not?"

Auditor McKinney: "Because I didn't."

Attorney Berkowitz: "Was there a reason you didn't?"

Auditor McKinney: "No. Because I made a note to my attorney on it but I didn't call -- I did not call the parties that you just indicated."

Attorney Berkowitz: "You didn't verify your recollection?"

Auditor McKinney: "No, I didn't."

Attorney Berkowitz: "And this recollection was three years ago. Wouldn't it have been simple to call one of the people to make sure your recollection was correct?"

Auditor McKinney: "Well, I did not call them. I just didn't call them."

Attorney Berkowitz: "Is Mr. Daniels still employed by the State?"

Auditor McKinney: "Yes."

Attorney Berkowitz: "Do you know where his office is?"

Auditor McKinney: "Yes, I do."

Attorney Berkowitz: "Where is it?"

Auditor McKinney: "345 Adams Street."

Attorney Berkowitz: "Where is your office located?"

Auditor McKinney: "345 Adams."

Attorney Berkowitz: "Do you see Mr. Daniels on a current basis?"

Auditor McKinney: "Yes."

Attorney Berkowitz: "Do you speak to him on a current basis?"

Auditor McKinney: "Yes."

Attorney Berkowitz: "But you never called him yesterday about that?"

Auditor McKinney: "No."

Attorney Berkowitz: "Do you know where Mr. Macchio's office is?"

Auditor McKinney: "Albany."

Attorney Berkowitz: "Who is he?"

Auditor McKinney: "Coordinator for my office in Albany."

Attorney Berkowitz: "Did you ever speak to Mr. Macchio?"

Auditor McKinney: "I spoke to him prior."

Attorney Berkowitz: "And you were in Mr. Macchio's office when you told him about this?"

Auditor McKinney: "No. Mr. Matthews --"

Attorney Berkowitz: "No. Were you in Mr. Matthews' office when you told him about the error?"

Auditor McKinney: "Yes."

Attorney Berkowitz: "That's a State office?"

Auditor McKinney: "No. He was at my hotel room."

Attorney Berkowitz: "This was yesterday?"

Auditor McKinney: "Yes."

Attorney Berkowitz: "And is Mr. Macchio available by telephone in this area?"

Auditor McKinney: "I would assume so." (Tr., pp. 65-69.)

#### The Test Period Audit

As noted in Finding of Fact "8", the auditor performed an audit of On-Site Petroleum's nontaxable sales for the period September 1, 1984 through November 30, 1984. It appears that the auditor selected this particular quarter because it was the only quarter for which the taxpayer reported any nontaxable sales. A workpaper in the Division's Exhibit "J" shows On-Site Petroleum's sales as reported on its sales tax returns as follows:

| Period <u>Ending</u> | Gross <u>Sales</u> | Taxable <u>Sales</u> | Nontaxable <u>Sales</u> |
|----------------------|--------------------|----------------------|-------------------------|
| 8/31/84              | \$ 472,035.00      | \$ 472,035.00        |                         |
| 11/30/84             | 568,170.00         | 426,726.00           | \$141,444.00            |
| 2/28/85              | 425,678.00         | 425,678.00           |                         |
| 5/31/85              | 427,126.00         | 427,126.00           |                         |
| 8/31/85              | 259,355.00         | 259,355.00           |                         |
| 11/30/85             | 303,039.00         | 303,039.00           |                         |



|          |                   |                   |                     |
|----------|-------------------|-------------------|---------------------|
| 2/28/86  | 373,710.00        | 373,710.00        |                     |
| 5/31/86  | 334,184.00        | 334,184.00        |                     |
| 8/31/86  | 315,457.00        | 315,457.00        |                     |
| 11/30/86 | 278,921.00        | 278,921.00        |                     |
| 2/28/87  | 301,933.00        | 301,933.00        |                     |
| 5/31/87  | <u>258,506.00</u> | <u>258,506.00</u> |                     |
|          | \$4,318,114.00    | \$4,176,670.00    | <u>\$141,444.00</u> |

Petitioners introduced into the record as Exhibit "6" a photocopy of the auditor's "non-taxable sales test" for the period September 1, 1984 through November 30, 1984. This analysis shows that the auditor reviewed invoices which petitioners claimed were for nontaxable sales amounting to \$56,066.71. Of these invoices, the auditor determined that the following invoices totalling \$6,562.20 (which were analyzed on a monthly basis) did not have supporting documentation, such as a resale or tax-exempt certificate, as detailed on a work schedule entitled "Non-taxable sales test 9/1/84-11/30/84" dated September 2, 1986 (Petitioners' Exhibit "6"):

| <u>Date of Invoice</u> | <u>Vendor</u>          | <u>Invoice Amount</u> |            |
|------------------------|------------------------|-----------------------|------------|
| 9/7/84                 | Otis Elevator          | \$ 294.00             |            |
| 9/7/84                 | Schiavone-Daidone      | 40.00                 |            |
| 9/15/84                | N.Y. Botanical Gardens | 592.65                |            |
| -- <sup>10</sup>       | Acme Skillman          | 309.75                |            |
| --                     | Otis Elevator          | 50.00                 |            |
| 9/30/84                | Acme Skillman          | 399.16                |            |
| --                     | Otis Elevator          | 160.80                |            |
| --                     | Otis Elevator          | <u>147.40</u>         |            |
| September 1984 total:  |                        | \$1,993.76            |            |
| --                     | Otis Elevator          | \$ 147.40             |            |
| --                     | Acme Skillman          | 246.58                |            |
| --                     | Alpha Tank Co.         | 1,285.25              |            |
| --                     | Otis Elevator          | <u>150.62</u>         |            |
| October 1984 total:    |                        |                       | \$1,682.45 |

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<sup>10</sup>The photocopy of this schedule in evidence was copied in a manner that many invoice dates were cut off so that no date is indicated above for many of the invoices.

|                      |                          |                   |            |
|----------------------|--------------------------|-------------------|------------|
| 11/15/84             | N.Y. Botanical Gardens   | \$ 667.29         |            |
| --                   | Invirex                  | 228.55            |            |
| --                   | G. W. Rogers Const.      | 475.28            |            |
| --                   | Otis Elevator            | 147.40            |            |
| --                   | Otis Elevator            | 142.04            |            |
| 11/30/84             | Acme Skillman            | 369.58            |            |
| --                   | G. W. Rogers Const.      | 695.85            |            |
| --                   | Rockefeller Manag. Corp. | 120.00            |            |
| --                   | Technical/Pentagon       | <u>40.00</u>      |            |
| November 1984 total: |                          | <u>\$2,885.99</u> |            |
|                      |                          | Total             | \$6,562.20 |

The work schedule dated September 2, 1987 (Petitioners' Exhibit "6") shows that the auditor then computed a margin of error of 72.672% based upon the following calculation:

|                                                                                              |                   |
|----------------------------------------------------------------------------------------------|-------------------|
| Invoices treated as taxable<br>due to lack of documentation<br>to substantiate nontaxability | \$ 6,562.20       |
| Missing invoices                                                                             | <u>125,083.00</u> |
| Total of invoices treated as<br>taxable which petitioners<br>claimed as nontaxable           | \$131,645.00      |

The auditor then determined the margin of error of 72.672% by dividing \$131,645.00 by \$181,150.00 (nontaxable sales for the test period quarter per the books of On-Site Petroleum as noted in Finding of Fact "15").

By a review of a schedule labeled "Non-taxable sales 6/1/84-5/31/87", a workpaper numbered "4A" included in the Division's Exhibit "J", the auditor determined, by "using the accountant's [presumably Mr. Doloboff's] worksheets" (tr., p. 50), the nontaxable sales claimed by On-Site Petroleum for the entire audit period of \$1,247,673.00 as follows:

| Period <u>Ending</u> | Gross Sales<br>Per Quarter<br>Per Books | Taxable Sales<br>Reported<br>On Returns | Sales Tax<br>Paid | Nontaxable <u>Sales</u> <sup>11</sup> |
|----------------------|-----------------------------------------|-----------------------------------------|-------------------|---------------------------------------|
| 8/31/84              | \$ 706,700.00                           | \$ 472,035.00                           | \$ 38,943.00      | \$ 195,722.00                         |
| 11/30/84             | 643,081.00                              | 426,726.00                              | 35,205.00         | 181,150.00                            |
| 2/28/85              | 669,095.00                              | 425,678.00                              | 35,118.00         | 208,299.00                            |
| 5/31/85              | 600,590.00                              | 427,126.00                              | 35,238.00         | 138,226.00                            |
| 8/31/85              | 490,500.00                              | 259,355.00                              | 21,397.00         | 209,748.00                            |
| 11/30/85             | 358,307.00                              | 303,039.00                              | 25,001.00         | 30,267.00                             |
| 2/28/86              | 549,072.00                              | 373,710.00                              | 30,831.00         | 144,531.00                            |
| 5/31/86              | 425,387.00                              | 334,184.00                              | 27,570.00         | 63,633.00                             |
| 8/31/86              | 378,744.00                              | 315,457.00                              | 26,025.00         | 37,262.00                             |
| 11/30/86             | 316,444.00                              | 278,921.00                              | 23,011.00         | 14,512.00                             |
| 2/28/87              | 320,040.00                              | 301,933.00                              | 24,910.00         | (6,803.00)                            |
| 5/31/87              | <u>310,959.00</u>                       | <u>258,506.00</u>                       | <u>21,327.00</u>  | <u>31,126.00</u>                      |
| Total                | \$5,768,919.00 <sup>12</sup>            | \$4,176,670.00                          | \$344,576.00      | \$1,247,673.00                        |

The margin of error of 72.672% noted in Finding of Fact "14" was subsequently decreased by the auditor to 68.878% pursuant to the following recalculation shown on a worksheet numbered "4" dated April 21, 1989, which is also included in the Division's Exhibit "J":

|                                                                                                                    |                           |
|--------------------------------------------------------------------------------------------------------------------|---------------------------|
| Disallowed sales<br>(Invoices treated as taxable<br>due to lack of documentation<br>to substantiate nontaxability) | \$ 6,660.00 <sup>13</sup> |
|--------------------------------------------------------------------------------------------------------------------|---------------------------|

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Nontaxable sales were calculated by subtracting (i) taxable sales reported and (ii) sales tax paid from the gross sales per quarter per books. For example, for the period ending 11/30/84 (which the auditor examined as a test period), nontaxable sales of \$181,150.00 were computed by subtracting taxable sales reported on sales tax returns of \$426,726.00 and sales tax paid of \$35,205.00 from gross sales for the quarter per books of \$643,081.00 (\$643,081.00 - \$426,726.00 - \$35,205.00 = \$181,150.00).

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The auditor testified that he accepted On-Site Petroleum's gross sales from Mr. Doloboff's worksheets as correct (tr., p. 53).

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The auditor rounded off the \$6,562.20 shown in Finding of Fact "14" upward to \$6,660.00 to the disadvantage of petitioners.

|                  |                          |
|------------------|--------------------------|
| Missing invoices | 117,423.00 <sup>14</sup> |
| Total disallowed | \$124,083.00             |

The auditor then determined the margin of error of 68.878% by dividing \$124,083.00 by \$180,150.00.<sup>15</sup>

The auditor calculated tax due of \$70,898.21 on sales treated as nontaxable by On-Site Petroleum which were not substantiated as such by applying the margin of error of 68.878% noted in Finding of Fact "16" to total nontaxable sales as per On-Site Petroleum's books of \$1,247,673.00, which resulted in additional sales subject to tax of \$859,372.21. Applying a tax rate of 8¼%, the auditor determined tax due on such sales of \$70,898.21. If the auditor had utilized a corrected margin of error of 68.497% instead of 68.878%, additional sales subject to tax would be calculated as \$854,618.57, with tax due thereon of \$70,506.03.

Two Other Areas in Which Additional Tax was Asserted as Due

The auditor also found sales tax due of \$2,970.00 on the sale by On-Site Petroleum on June 30, 1986 of computer equipment to IBM for the amount of \$36,000.00. Applying the sales tax rate of 8¼% to \$36,000.00, the auditor determined sales tax due of \$2,970.00. He categorized this tax due as "fixed assets tax due".

Mr. Doloboff, On-Site Petroleum's accountant, testified that this transaction was not really the sale of a computer but

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The earlier calculation showed missing invoices of \$125,083.00. Apparently, the auditor was able to review additional invoices.

<sup>15</sup>It is unclear why the auditor used \$180,150.00 instead of \$181,150.00 which he used in the earlier calculation and which is the amount shown in Finding of Fact "15". If \$181,150.00 was used in this recalculation, the margin of error would be 68.497%, not 68.878%.

rather was a trade-in of a computer on the purchase of a new computer. However, no documentation was introduced to support this testimony.

The second area in which the auditor asserted additional tax due was categorized as "expense purchases". He testified as follows concerning his methodology:

"I took a year of expense purchases as my test year. Taxpayer's rep provided an analysis of the categories which I wanted to actually review and he also provided me with invoices. Okay? I then did my analysis in each category and those items that he did not have or did not provide me, I assessed it" (tr., p. 47).

A worksheet numbered "5" and labeled "Expense Purchase Year 6/30/86 Summary" included in the Division's Exhibit "J" shows tax asserted due on expense purchases totalling \$36,403.94 for the 1986 sales tax year, June 1, 1985 through May 31, 1986, calculated as follows:

|                             | <u>Amount Assessed</u> |
|-----------------------------|------------------------|
| (1) Computer Expense        | \$ 647.33              |
| (2) Repairs and Maintenance | 21,196.89              |
| (3) Equipment Rental        | 4,361.58               |
| (4) Office Expenses         | <u>10,197.94</u>       |
|                             | \$36,403.94            |

The auditor then applied the tax rate of 8¼% to compute tax due for the 1986 sales tax year of \$3,003.30. He multiplied this amount by three to compute an estimated tax due on expense purchases for the entire three-year audit period of \$9,009.90. It is observed that included in the Division's Exhibit "J" are six very detailed worksheets showing the auditor's analysis of expenses in the four categories noted above on which tax was asserted as due. It is noted that the auditor's detailed analysis of On-Site Petroleum's postage and stationery expenses resulted in no additional tax found due. Petitioners introduced no evidence to show that tax, in fact, had been paid on the various expenses upon which the auditor determined no tax had been paid.

An auditor's worksheet numbered "2" in Division's Exhibit "J" allocated tax asserted as due, for each of the three audit areas at issue, over the 12 sales tax quarters at issue, as follows:

| <u>Period Ending</u> | <u>Nontaxable Sales Tax Due</u> | <u>Expense Purchases Tax Due</u> | <u>Fixed Assets Tax Due</u> | <u>Total Tax Due</u> |
|----------------------|---------------------------------|----------------------------------|-----------------------------|----------------------|
|----------------------|---------------------------------|----------------------------------|-----------------------------|----------------------|

|          |                 |               |            |                 |
|----------|-----------------|---------------|------------|-----------------|
| 8/31/84  | \$ 5,908.18     | \$ 750.82     | \$ -0-     | \$ 6,659.00     |
| 11/30/84 | 5,908.18        | 750.82        | -0-        | 6,659.00        |
| 2/28/85  | 5,908.18        | 750.82        | -0-        | 6,659.00        |
| 5/31/85  | 5,908.18        | 750.82        | -0-        | 6,659.00        |
| 8/31/85  | 5,908.18        | 750.82        | -0-        | 6,659.00        |
| 11/30/85 | 5,908.18        | 750.82        | -0-        | 6,659.00        |
| 2/28/86  | 5,908.18        | 750.82        | -0-        | 6,659.00        |
| 5/31/86  | 5,908.18        | 750.82        | -0-        | 6,659.00        |
| 8/31/86  | 5,908.18        | 750.82        | 2,970.00   | 9,629.00        |
| 11/30/86 | 5,908.18        | 750.82        | -0-        | 6,659.00        |
| 2/28/87  | 5,908.18        | 750.82        | -0-        | 6,659.00        |
| 5/31/87  | <u>5,908.18</u> | <u>750.82</u> | -0-        | <u>6,659.11</u> |
| Total    | \$70,898.21     | \$9,009.90    | \$2,970.00 | \$82,878.11     |

Responsible Officers

As noted in Findings of Fact "4" and "5", petitioner Ashley Jarwood executed three consents extending the period of limitations for assessment of tax against the corporate petitioner dated August 11, 1987, November 13, 1987 and May 5, 1988, respectively. In addition, the record includes the following evidence concerning Ms. Jarwood's involvement and/or relationship with On-Site Petroleum:

(1) The auditor testified that Mr. Doloboff, On-Site Petroleum's accountant, identified Ms. Jarwood as an officer of the company, and he noted such information on his Sales Tax Audit Report Information Sheet (Division's Exhibit "M");

(2) Mr. Doloboff also testified that he "was told by the officers of the corporation" that their records were taken by the IRS (tr., p. 175), and when questioned concerning the names of such officers, responded Ashley Jarwood;

(3) A stock agreement dated July 12, 1979 (included in the Division's Exhibit "K") gave Ms. Jarwood 25% of the company's stock, made her a director and treasurer of the company, authorized a salary for her and granted her the power to sign checks and commercial paper;

(4) Ms. Jarwood signed an application dated August 29, 1988 for registration of On-Site Petroleum as a petroleum distributor in her capacity as secretary/treasurer of the corporation which indicated that she owned 100% of the stock of On-Site Petroleum (also included in Exhibit "K");

(5) Ms. Jarwood executed two powers of attorney on behalf of On-Site Petroleum, one dated May 28, 1985 in her capacity as president, and the second dated December 9, 1987 in her capacity as treasurer;

(6) Ms. Jarwood also signed various tax returns on behalf of On-Site Petroleum, including the following:

(i) Metropolitan transportation business tax surcharge returns for the years ending June 30, 1987, June 30, 1988 and June 1990;

(ii) U.S. corporation income tax return for the year 1984 which also listed Ms. Jarwood as an officer in Schedule E, "Compensation of Officers", noting compensation for 1984 of \$33,800.00, the highest of the two corporate officer salaries shown therein;

(iii) New York State corporation franchise tax reports for the years ending June 30, 1986 and June 30, 1987;

(iv) A short form New York State corporation franchise tax report for the year ending June 30, 1988; and

(v) The six sales and use tax returns noted in Finding of Fact "3"; and

(7) Ms. Jarwood signed On-Site Petroleum's petition to the Division of Tax Appeals in her capacity as president.

The record includes the following evidence concerning petitioner Trevor Wisdom's involvement and/or relationship with On-Site Petroleum:

(1) As was the case with Ms. Jarwood, as noted in Finding of Fact "22", Mr. Doloboff identified Mr. Wisdom as an officer of On-Site Petroleum, and the auditor noted such information on his Sales Tax Audit Report Information Sheet;

(2) On-Site Petroleum's New York City Corporation Tax Return for the year ending June 30, 1986 and the State Corporation Franchise Tax Report for the same year each listed Mr. Wisdom as a corporate officer;

(3) On-Site Petroleum's U.S. Corporation Income Tax Return for 1985 listed

Mr. Wisdom in Schedule E, "Compensation of Officers", as an officer who devoted his full time to the corporation for compensation of \$36,400.00, which comprised all of the company's salaries to officers for the year; and

(4) A computer printout of sales tax registration information (i) indicated that Mr. Wisdom was an officer of On-Site Petroleum on June 1, 1984, and (ii) contains a State wage reporting report showing that Mr. Wisdom was on the company's payroll as of March 31, 1987 with quarterly wages of \$8,400.00.

Petitioners introduced no evidence to contradict the evidence noted in Findings of Fact "22" and "23". Neither Ms. Jarwood nor Mr. Wisdom appeared to testify at the hearing.

#### SUMMARY OF THE PARTIES' POSITIONS

Petitioners contend that the notices of determination dated December 15, 1991 issued against Ashley Jarwood and Trevor Wisdom were untimely because the three-year statute of limitations under Tax Law § 1147(b) had expired more than one year earlier. Furthermore, petitioners maintain that Ashley Jarwood and Trevor Wisdom "were not proven to be officers of [On-Site Petroleum], and, if officers, were not proven to be under a duty to act for the petitioner" (Petitioners' brief, p. 7). Petitioners also argue that the notice of determination dated December 15, 1991 issued against On-Site Petroleum was untimely because Mr. Doloboff's consent to extend the time to assess was ineffective because the power of attorney signed by Ms. Jarwood on behalf of On-Site Petroleum was defective inasmuch as Ms. Jarwood's signature was not notarized or properly witnessed.

Petitioners also challenge the audit which utilized an examination of a test period to estimate taxes due for the entire audit period:

"[T]he Tax Department failed to offer any evidence or even to argue that the Petitioner's books and records were not sufficient to enable verification and audit of its tax returns" (Petitioners' brief, pp. 16-17).

Petitioners contend that On-Site Petroleum had adequate records so that the Division could perform a detailed audit, and the Division should not be able to estimate tax due when it was involved in the seizure of the records.



In addition, petitioners argue that the audit "was riddled with computational errors, deceptions, improprieties and was not reasonably calculated to reflect the tax due" (Petitioners' brief, p. 27).

In its answering brief, the Division, citing Matter of Robert DeFilippis Crane Service (Tax Appeals Tribunal, June 9, 1994), counters that the power of attorney appointing Mr. Doloboff was subsequently ratified by the many actions taken on behalf of On-Site Petroleum after the date of the facially defective power of attorney. Therefore, the assessments against petitioners were not time barred. The Division maintains that due to petitioners' inability to produce the corporation's books and records, the Division was justified in using estimation techniques to determine additional sales tax due, and the techniques utilized were reasonable. Furthermore, the Division maintains that the documentary evidence introduced into the record establishes that, during the audit period, Ashley Jarwood and Trevor Wisdom were responsible officers of On-Site Petroleum and personally liable for sales taxes due from the corporation.

In their reply brief, petitioners emphasize that the Division was not "a bystander" with regard to the "seizure and ultimate loss" of the books and records of On-Site Petroleum (Petitioners' reply brief, p. 9). Rather, "the Tax Department's own evidence brings into question whether the Tax Department had possession of the [corporate] Petitioner's books and records" (Petitioners' reply brief, p. 9). Petitioners maintain that the auditor never first determined that the books and records were not sufficient to conduct an audit.

#### CONCLUSIONS OF LAW

A. Tax Law § 1147(b) provides, in relevant part, as follows:

"[E]xcept in the case of a willfully false or fraudulent return with intent to evade the tax no assessment of additional tax shall be made after the expiration of more than three years from the date of filing of a return."

The parties have not stipulated that the three notices of determination dated December 15, 1991 were, in fact, mailed on December 15, 1991. Nor have they stipulated the dates on which each of the twelve quarterly sales tax returns were filed. Consequently, it is not known with certainty

the exact dates from which the three-year limitation period specified in Tax Law § 1147(b) commenced to run or the exact date on which it was tolled upon the mailing of the statutory notices. Nonetheless, the parties by focusing upon the validity of the consents detailed in Finding of Fact "4", impliedly conceded that without such consents the limitation period for assessment would have expired. Consequently, the first issue to be addressed is whether the consents numbered "4", "5", and "6" executed on behalf of On-Site Petroleum by Benet Doloboff should be given effect.

B. As noted in Finding of Fact "5", the power of attorney appointing Mr. Doloboff to represent On-Site Petroleum was signed by petitioner Ashley Jarwood, a corporate officer, whose signature was not notarized or properly witnessed as required by 20 NYCRR 2390.5(c). Nonetheless, it is concluded that this facially defective power of attorney may be given effect because a written power of attorney is not an indispensable element to establish a representative's authority (Matter of Jenkins Covington, N.Y., (Tax Appeals Tribunal, November 21, 1991, confirmed 195 AD2d 625, 600 NYS2d 281; lv denied 82 NY2d 664, 610 NYS2d 151). In the matter at hand, On-Site Petroleum has subsequently ratified its representation by Mr. Doloboff by his continued position as its accountant and the numerous actions he has taken on behalf of On-Site Petroleum including the ones listed in Finding of Fact "5" (see, Gross v. New York State Teachers Retirement System, 81 Misc 2d 964, 366 NYS2d 777, revd on other grounds, 50 AD2d 980, 376 NYS2d 36; Matter of Robert DeFilippis Crane Service, supra; Matter of Top Shelf Deli, Tax Appeals Tribunal, February 6, 1992).

C. However, the issue concerning whether a corporate officer is bound by a corporation's consent to extend the period of limitation for assessment of tax is a more complicated matter which neither the Tax Appeals Tribunal nor the courts have addressed.<sup>16</sup>

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<sup>16</sup>In Matter of BAP Appliance Corp. (Tax Appeals Tribunal, May 28, 1992), a consent fixing tax due was signed on behalf of a corporation by a corporate officer. The Tax Appeals Tribunal found the consent to be binding on both the corporation and the corporate officer. However, the decision indicates that the corporate officer never argued that the consent might be binding on the corporation and not her. Rather, both of the petitioners argued before the Tribunal that they had been misled and "browbeaten into signing the consent." The Tribunal found no evidence that the

D. It is observed that the former State Tax Commission has addressed this issue in several matters including Matter of Playmor Amusement Co. (State Tax Commission, September 27, 1982 [TSB-H-82(140)S]). In Playmor, the State Tax Commission stated:

"Harold Kaufman in his capacity as president signed consents to extend the statute of limitations on Playmor Amusement Co., Inc. . . . Such consent by a corporation extends the liability of its corporate officers required to collect tax under sections 1131(1) and 1133(a) of the Tax Law for the period consented to by the corporation."

Tax Law § 1133(a), in relevant part, provides that "every person required to collect any tax imposed by [Article 28] shall be personally liable for the tax imposed, collected or required to be collected under [Article 28]."

Under Tax Law § 1131(1), "persons required to collect tax" include, among others:

"any officer, director or employee of a corporation or of a dissolved corporation . . . who as such officer, director or employee is under a duty to act for such corporation . . . in complying with any requirement of [Article 28] . . ."

Apparently, the State Tax Commission based its determination on the reasoning that once a corporate officer is found to be a person under a duty to act for the corporation in complying with the provisions of Article 28, that officer is liable for any tax finally determined to be due from the corporation, including tax assessed under the consent provision of Tax Law § 1147(c).

The Tax Appeals Tribunal has decided that although determinations of the State Tax Commission are entitled to respectful consideration, they are not binding precedents in the Division of Tax Appeals (see, Matter of Racal Corp., Tax Appeals Tribunal, May 13, 1993). Consequently, a close examination of the consent provision of Tax Law § 1147(c) is necessary.

E. Tax Law § 1147(c) provides, in relevant part, as follows:

"Where, before the expiration of the period prescribed herein for the

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consent was signed involuntarily and thus found the consent binding on the petitioners. In Matter of Rashbaum (Tax Appeals Tribunal, December 15, 1994), the Division, on exception to the Tribunal, did not challenge the Administrative Law Judge's determination that the corporate officer was not bound by the corporation's consent. As a result, the Tribunal did not resolve this issue.

assessment of an additional tax, a taxpayer has consented in writing that such period be extended the amount of such additional tax due may be determined at anytime within such extended period. The period so extended may be further extended by subsequent consents in writing made before the expiration of the extended period." (Emphasis added.)

The Tax Appeals Tribunal, in Matter of Bellows (September 27, 1990), cited approvingly the following principle of statutory construction set forth by the Court of Appeals in Cooper-Snell Co. v. State of New York (230 NY 249):

"Statutes . . . are to be read according to the natural and obvious import of their language without resorting to subtle or forced construction either limiting or extending their effect."

The most natural and obvious reading of this statutory consent provision is that the "tax due" from the "taxpayer" who executed the consent (thereby consenting in writing) may be determined at any time within the extended period. This provision should not be read so broadly as to mean that a consent by a corporation to extend the period of limitation for assessment of tax is binding on all corporate officers who may be liable for that tax, regardless of the actual wording of the consent and the specific person who signed it. Rather, the effect of the written consent should be based upon its actual wording. In the matter at hand, as noted in Footnote "7" the consents were executed on behalf of On-Site Petroleum only, and the effect of such consents should be limited to the taxpayer who signed them, i.e., On-Site Petroleum. Consequently, such consents were not effective to extend the period of limitation for assessing tax against Ms. Jarwood and Mr. Wisdom as well.

F. Tax Law § 1138(a)(1) provides, in part, that if a return required to be filed is incorrect or insufficient, the amount of tax due shall be determined on the basis of such information as may be available. This section further provides that, if necessary, the tax may be estimated on the basis of external indices. However, the Division may not utilize external indices or methodologies to estimate tax as the basis for an assessment unless it first determines that the taxpayer's books and records are inadequate for purposes of verifying sales and purchases subject to sales and use tax (Matter of Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41).

G. If the taxpayer's records are, in fact, inadequate, the Division must then select a method of audit reasonably calculated to reflect taxes due, and the burden is on the taxpayer to establish by clear and convincing evidence that the method used to arrive at the tax assessment and the assessment are erroneous (Matter of Grecian Square v. State Tax Commn., 119 AD2d 948, 501 NYS2d 219; Matter of Sol Wahba, Inc. v. State Tax Commn., 127 AD2d 943, 512 NYS2d 542). Furthermore, the Tax Appeals Tribunal has noted that:

"Where the taxpayer establishes that the audit methodology is based on an assumption that is fundamentally flawed, the taxpayer has sustained his burden of proof and is not required to show the exact amount of taxes due [citations omitted]" (Matter of Bernstein-On-Essex, Tax Appeals Tribunal, December 3, 1992).

H. To determine the adequacy of a taxpayer's records, the Division must first request and thereafter thoroughly examine the taxpayer's books and records for the entire period of the proposed assessment (Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, lv denied 71 NY2d 806, 530 NYS2d 109; Matter of King Crab Restaurant v. State Tax Commn., 134 AD2d 51, 522 NYS2d 978). The purpose of this examination is to determine whether the taxpayer's books and records are so insufficient as to make it virtually impossible for the Division to verify taxable sales receipts and conduct a complete audit (Matter of Chartair, Inc. v. State Tax Commn., supra; Matter of Ronnie's Suburban Inn, Tax Appeals Tribunal, May 11, 1989). Where the Division follows such steps, it then may resort to the estimation of tax by the use of external indices and other estimating methodologies.

I. It is observed that the auditor performed a test period audit on or about February 4, 1988 after deciding to conduct a test period audit in mid-December, 1987. Based on the lack of any entry in the auditor's log that the taxpayers agreed to permit a test period audit, the lack of any written agreement and the testimony of Mr. Doloboff that he could not recall such agreement, it must be concluded that in order for the Division to utilize the test period audit as a basis for the notices of determination, it must be determined that as of February 4, 1988, it had made an adequate request for On-Site Petroleum's books and records and thoroughly examined such books and records for the entire period of the proposed assessment prior to the test period audit. But it cannot be so concluded that the Division took such necessary steps before

resorting to the test period audit to estimate tax in early February 1988 because as of such date, the parties had not yet exhausted the possibility that the complete records of On-Site Petroleum would be made available for review within a reasonable period of time. The facts and circumstances in this matter are unlike those in Matter of Clone Enterprises (Tax Appeals Tribunal, March 19, 1992) where there was a studied disregard of requests for records by the taxpayers.

J. In late April 1988, the auditor became aware, as noted in Finding of Fact "9", that the records he was waiting to review might never become available because of their seizure by "marshalls". As of such date, the auditor might have made out a better case for utilizing estimating procedures to determine tax. However, the fact of the matter is that the auditor chose to accommodate petitioners by attempting to obtain the seized records from the IRS as detailed in Finding of Fact "10". Furthermore, as noted in Finding of Fact "4", the auditor and On-Site Petroleum extended the period of limitation for assessment five times after the seizure of the records presumably to provide additional time for the seized records to be obtained and reviewed by the auditor. In fact, as noted in Finding of Fact "11", the auditor actually was informed in the summer of 1991 that the "State does have the records". The auditor's attempt to contravene this fact, as detailed in Finding of Fact "11" which quotes the vigorous cross-examination of the auditor on this point at great length, was unpersuasive. In particular, the auditor's testimony that he meant to write in his log that the State "does not have the records" does not ring true because the use of the word "HOWERE" (a misspelling of "however") makes no sense if the entry read, "the State does not have the records". "Howere" makes sense only if the entry is in the affirmative, i.e., that "the State does have the records". Furthermore, the cross-examination of the auditor was effective in bringing out the fragility of the auditor's backtracking on his entry, by his lack of a proper explanation for why he did not contact his branch chief or Mr. Macchio to confirm his current recollection that the State does not have the records or why he made no written memorandum or other writing to confirm this significant, if not dramatic, change to his log. In short, the record established that the auditor assumed the

task of obtaining the seized records and, in fact, it appears the records were obtained. As a result, for the auditor to avoid reviewing such records and to base a determination by use of estimating methodologies cannot be countenanced. In addition, it is observed that as of the summer of 1991, the audit was still being conducted due to the execution of the consents extending the period of assessment. Therefore, the matter at hand is unlike the situation in Matter of Queens Discount Appliances (Tax Appeals Tribunal, December 30, 1993 [wherein the Tribunal noted that records must be presented at the time of the audit and, in effect, may be ignored if presented later]).

K. The Tax Appeals Tribunal, in Matter of Bleistein (August 11, 1994), noted that Administrative Law Judges may not "moot" issues and directed the analysis of all issues raised by the parties in the administrative hearing. Consequently, the issues designated "IV" and "V" will be addressed.

L. It is concluded that the methodology which the Division utilized to estimate sales and use taxes due which is analyzed in great detail in Findings of Fact "12" through "21" was reasonably calculated to reflect sales and use taxes due. It is observed that considerable latitude is given to an auditor in estimating sales and it is only necessary that sufficient evidence be produced to demonstrate that a rational basis existed for the auditor's calculations (Matter of Shukry, Tax Appeals Tribunal, March 28, 1991, confirmed 184 AD2d 874, 585 NYS2d 531). The minor errors in the methodology utilized as noted in footnotes "13" and "15", such as rounding-up to the disadvantage of the taxpayer, do not alter such conclusion. Furthermore, the auditor's treatment of sales to the New York Botanical Garden as taxable due to the lack of substantiation from petitioners to document their nontaxability was proper (see, Matter of M & B Appliances, Tax Appeals Tribunal, August 20, 1992). In short, petitioners failed to prove by clear and convincing evidence that the methodology utilized by the Division to estimate tax due was erroneous (see, Center Moriches Monument Co. v. Commissioner of Taxation & Fin., \_\_\_ AD2d \_\_\_, 621 NYS2d 720).

M. It is also concluded that the Division established a sufficient basis for treating

Ashley Jarwood and Trevor Wisdom under Tax Law § 1131(1) as officers of On-Site Petroleum responsible for the corporation's collection and payment of sales and use taxes based upon the evidence detailed in Findings of Fact "22" and "23". The individual petitioners, who did not testify or offer any other proof at the hearing, did not sustain their burden of proving that they were merely nominal corporate officers (see, Martin v. Commr. of Taxation & Fin., 162 AD2d 890, 558 NYS2d 239).

N. In light of the conclusion that the Division improperly resorted to an estimate of tax due from On-Site Petroleum, the assertion of tax due against the corporate taxpayer is upheld only to the extent of tax determined due as follows:

- (1) Tax due of \$6,562.20 (plus penalty and interest) for the sales tax quarter September 1, 1984 through November 30, 1984 based upon the invoices petitioner treated as nontaxable which the auditor reviewed and determined were taxable as noted in Findings of Fact "13" and "14";
- (2) Tax due of \$2,970.00 (plus penalty and interest) based upon the sale of computer equipment to IBM as detailed in Finding of Fact "18"; and
- (3) Tax due of \$3,003.30 (plus penalty and interest) on expense purchases for the 1986 sales tax year which were audited in detail as noted in Finding of Fact "20".

O. The petitions of Ashley Jarwood, as officer of On-Site Petroleum, Inc., and Trevor Wisdom, as officer of On-Site Petroleum, Inc., are granted, and the notices of determination dated December 15, 1991 issued against them as individuals are cancelled. The petition of On-Site Petroleum, Inc. is granted, except to the extent indicated in Conclusion of Law "N", and the notice of determination dated December 15, 1991 is to be modified to so conform.

DATED: Troy, New York  
April 6, 1995

/s/ Frank W. Barrie  
ADMINISTRATIVE LAW JUDGE